

Mehta (Migration) [2023] AATA 3039 (6 September 2023)

- 1.
- 2.

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mr Sandeep Mehta Mrs Anu Mehta Miss Mehak Mehta Master Reyansh Mehta
REPRESENTATIVE:	Mr Sobaran Singh (MARN: 9791702)
CASE NUMBER:	2102884
HOME AFFAIRS REFERENCE(S):	BCC2016/1765350
MEMBER:	SM Michael Cooke
DATE:	6 September 2023
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 187 - Regional Sponsored Migration Scheme visas: • Public Interest Criterion 4020 for the purposes of cl 187.213 of Schedule 2 to the Regulations

Statement made on 06 September 2023 at 8:41am

CATCHWORDS

MIGRATION – Regional Employer Nomination (Permanent) (Class RN) visa – Subclass 187 (Regional Sponsored Migration Scheme) – Restaurant Manager – false or misleading information – criminal history – sale of products with counterfeit trademarks – ‘the necessary quality of purposeful falsity’ – decision under review remitted

3.

LEGISLATION

Migration Act 1958 (Cth), s 65

Migration Regulations 1994 (Cth), Schedule 2, cl 187.213; Schedule 4, PIC 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42

4.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 23 February 2021 to refuse to grant the applicants Regional Employer Nomination (Permanent) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
6. The applicants applied for the visas on 17 May 2016. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 187.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the applicant did not meet PIC4020 in cl 187.213.
7. The applicants were represented in relation to the review.
8. The applicants' representative has provided a comprehensive submission and other documentation addressing the adverse findings of the delegate.
9. The main submission reads as follows:
 10. The applicant, Sandeep Kumar Mehta, is working as a restaurant manager in Australia since 2015. He has a spouse and two children aged 21 and 16, who are all living in Australia.
 11. 2. He applied for a subclass 187 visa on 17 May 2016. The application was prepared and lodged by his appointed migration agent in Australia.
 12. 3. The application contained one pertinent question: Has any applicant ever been convicted of an offence in any country (including any conviction which is now removed from official records)? The applicant (through his agent) replied "No" to this question.
 13. 4. The applicant admits that this answer was wrong. It should have been "Yes".
 14. 5. No copy of the record of the visa application was provided to him by the agent. Therefore, he had no knowledge of this wrong answer. In 2017, he was requested by his agent to apply, amongst other things, for his Thai Police clearance, as he had lived and operated businesses in Thailand from 1997 till 2013. Accordingly, the applicant applied for the Thai police clearance report and forwarded it to his agent, who uploaded it onto the Immi Account on 2 March 2018.
 15. 6. The report from the Thai Special Branch Bureau of the Royal Thai Police was dated 7 April 2017. It confirmed the following "That an offence of sale, offering for sale and keeping in possession for sale the products with counterfeit trademarks, fake certification marks or joint trademarks". It also stated that he was sentenced by the Thai court to 1 year term of imprisonment and a fine of 15,000 baht. As a consequence of the applicant's confession to the offences and cooperation with the police in their investigations, his sentence was reduced to 6 months imprisonment and a fine of 7,500 baht. The term of imprisonment was suspended for a period of 2 years. The result of this sentence was that he paid a fine of 7,500 baht but did not serve any term of imprisonment. The offences occurred in 1997/1998. This record of conviction was subsequently cleared under a form of pardon/amnesty under their

Rehabilitation of Offenders Act as part of the 80th birthday celebration of the Thai King in 2007.

16. 7. Even after receiving this adverse report from the Royal Thai Police, the applicant did not take any step to rectify the above-mentioned wrong answer in his 187 visa application. The reason for this was that he was not aware of the error in the visa application.

17. 8. On 8 March 2018, the 187 visa application was refused by the delegate on the ground that he did not meet Regulation 187.223(3) in that the Minister had not approved the related nomination by his nominator. He applied to the AAT for a review of this 2018 visa refusal decision. The nominator also applied for the review of the nomination refusal. On 18 December 2020, the AAT set aside the refusal of the nomination decision and approved the nomination. On the same day, the related visa refusal decision was remitted to the AAT with the direction that the applicant met Regulation 187.223(3).

18. 9. On 20 January 2021, a delegate of the Department invited the applicant to comment on adverse information received by the Department, which was in respect to his answer to the above-mentioned question in his 187 visa application. The applicant responded to this invitation by providing a statutory declaration made on 7 February 2021 as well as submissions by his new agent.

19. 10. The applicant stated that when he instructed the former agent to lodge the 187 visa application in May 2016, he had not informed him nor did the agent ask him in relation to any conviction he may have had. As no copy of the record of the visa application was provided to him by the agent, the applicant had never been personally aware of this error in the application. The first time he became aware of the false answer was when he received the delegate's letter of invitation to comment dated 20 January 2021.

20. 11. On 23 February 2023, the delegate refused the applicant's subclass 187 visa on the ground that he did not meet PIC4020. The delegate stated as part of his reasons for refusal "I find that the applicant intentionally misled (emphasis is mine) the department by declaring that he had not ever (sic) been convicted of an offence in any country (including any conviction which is now removed from official records).

21. Therefore, based on the evidence and information before me, I find that the applicant has given information that is false and misleading in a material particular.

22. Accordingly, I am not satisfied that the applicant meets Public Interest Criterion (PIC) 4020(1)".

23. 12. The legal implications of PIC 4020

24. The leading case on this matter is *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 which covered in some detail the type of false information or bogus documents that attracted the operation of PIC 4020(1). I refer to the pertinent parts of Buchanan J's judgement in this case (emphasis is mine):

25. "It is apparent from the terms of PIC 4020 that it addressed the problem of attempts to work a fraud or deception on the assessment of claims for a visa. That is also evident from the fact that PIC 4020 states a "public interest" criterion, from the narrow and exceptional circumstances necessary to waive its requirements and, more generally, from the serious consequences that follow from its application. I

would not infer any apparent intention to disqualify a visa applicant who could explain an innocent mistake in a document or information provided by them. PIC 4020 is not directed, in my view, to innocent, unintended or accidental matters. However, different questions arise when information or documents provided in support of an application are revealed as false, in the purposely untrue sense of that term.

26. In my view, it should be accepted that an element of fraud or deception is necessary in order to attract the operation of PIC 4020. To take the example of bogus documents, a counterfeit document is not produced accidentally. Similarly, to charge that a statement is false is not to say only that it is wrong. The accusation potentially imports some element of knowledge or intention on somebody's part, and in my view does so in the present context.

27. Secondly, consideration of the circumstances of the introduction of PIC 4020 confirms me in the view derived from the text of PIC 4020 that it is not directed to information or documents which are not tainted in the way I have indicated.

28. In my view, it is not necessary (for reasons yet to be further developed) to show knowing complicity by a visa applicant. That would impose an impossible task on those administering the visa system. But it is necessary that the information or document have the necessary quality of purposeful falsity, whether or not the visa applicant can be shown to have knowledge of that fact."

29. 13. PIC 4020 impacts anyone who gives or cause to be given to the Minister and other specified bodies, a bogus document or information that is false or misleading in a material particular in relation to a visa application or a visa held by the applicant in the 12 months period before the application was made. The provision of the false information, however, must have the quality of purposeful falsity. It should contain an element of fraud or deception in order to attract the operation of PIC 4020.

30. 14. The applicant in this case admits having provided false information in the application by giving a wrong answer to the question as to whether he had been convicted.

31. 15. However, the applicant submits that the provision of the false information in the visa application was not done in order to defraud or deceive the Department. The circumstances outlined above point towards unintentional conduct, rather than a deliberate intention to provide false information to gain a positive visa outcome. The answer was not purposefully false. It was more of a case of carelessness in providing the information.

32. 16. The applicant had declared in his visa application that he had been employed and lived in Thailand for more than 10 years till 2013. Consequently, it would be mandatory for him to provide police clearances from all countries where he had lived for more than 12 months in the last 10 years prior to the application. Viewing it objectively, it would not have been in any way advantageous to him to provide a false answer because ultimately the police clearance certificate would reveal the conviction. Even after he was in receipt of the Thai police clearance in 2017, he did not take steps to rectify the false answer in the visa application as he was completely unaware of the false answer at that stage.

33. 17. On behalf of the applicant, I submit that the false information provided by the applicant was not provided with any intention to deceive or defraud the Department. I would also argue that it did not have the necessary quality of purposeful falsity.

34. 18. The applicant is not relying on the waiver provisions in PIC 4020(4) as there are no compelling or compassionate circumstances affecting Australia or Australian citizens/permanent residents.

35. 19. The applicant has not been convicted of any other offence since the conviction in Thailand, which was more than 25 years ago. He looks forward to a positive outcome of this application.

36. Dated 7 August 2023

37. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

38. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 187.213 for the grant of the visa. Broadly speaking, this requires that:

- there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

39. The requirements in PIC 4020(1) and (2) can be waived if there are certain 'compelling or compassionate reasons justifying the granting of the visa': PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

40. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.

41. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by

the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

42. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

43. **Findings and reasons about:**

whether there is evidence before the Tribunal that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth:

- a 'bogus document', as defined in s 5(1), i.e. a document that the Tribunal reasonably suspects is a document that:
 - purports to have been, but was not, issued in respect of the person, or
 - is counterfeit or has been altered by a person who does not have authority to do so, or
 - was obtained because of a false or misleading statement, whether or not made knowingly.

and/or

- 'information that is false or misleading in a material particular' as defined in PIC 4020(5), i.e. information that is:
 - false or misleading at the time it is given, and
 - relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

44. in relation to the visa application or a visa held in the 12 months before the visa application was made.

45. The applicant has admitted to providing 'information that is false or misleading in a material particular' as defined in PIC 4020(5). However, he advises that the act 'was not done in order to defraud or deceive the Department'. He has provided a convincing argument to the Tribunal that 'the necessary quality of purposeful falsity' was not present sufficient to engage the rubric in *Trivedi v MIBP* [2014] FCAFC 42 (see above).

46. Therefore, the applicant **meets** PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

47. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).

48. **Findings and reasons about whether:**

the applicant or any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1)

- and if so, whether the applicant was under 18 at the time the application for the refused visa was made, such that PIC 4020(2) does not apply

49. The Tribunal finds that neither the first named applicant nor any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1).

50. Therefore, PIC 4020(2) **is met** or **does not apply**.

Has the applicant satisfied the identity requirements?

51. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity.

52. The Tribunal is satisfied as to the identity of the first named applicant.

53. Therefore, the applicant **meets** PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

54. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).

55. **Findings and reasons about whether:**

the applicant or any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A);

and if so, whether the applicant was under 18 at the time the application for the refused visa was made.

56. The Tribunal finds that neither the first named applicant nor any member of the family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(2A)

57. Therefore, PIC 4020(2B) **is met** or **does not apply**.

58. On the basis of the above, the applicant **does** satisfy PIC 4020 for the purposes of cl 187.213.

DECISION

59. The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 187 - Regional Sponsored Migration Scheme visas:

- Public Interest Criterion 4020 for the purposes of cl 187.213 of Schedule 2 to the Regulations

Michael Cooke
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...